IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 273 of 1984

For Approval and Signature:

HONOURABLE **MS. JUSTICE R.M.DOSHIT**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to civil judge ?

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UNION OF INDIA & 3 - Appellant(s)

Versus

HAVABAI JUSAB & 1 - Defendant(s)

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Appearance :

MR AMAR D MITHANI for Appellants
MR MD RANA for Defendant(s) : 1,
RULE SERVED for Defendant(s) : 2,

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

Date : 21/06/2007

ORAL JUDGMENT

This Appeal under Section 100 CPC, preferred by the defendants nos. 1 to 4 [hereinafter collectively

referred to as, "***the Union of India***"] in Regular Civil Suit No. 246 of 1973, arises from the judgment and order dated 20th July, 1984 passed by the learned Assistant Judge, Rajkot at Gondal in Regular Civil Appeal No. 69 of 1979.

The respondent no.1-plaintiff is the owner of the suit house situated at Kotdasangani. The suit premises [*two rooms of the ground floor of the suit house*] was given over to the Union of India for housing a Post Office by the defendant no.5, the husband of the plaintiff. The Union of India took over possession of the suit premises as a lessee on 1st January, 1973.

The plaintiff instituted the above referred Regular Civil Suit No. 246 of 1973 in the Court of learned Civil Judge [SD], Gondal. According to her, the suit house belonged to her; she was estranged from her husband; and she had not authorized her husband to deal with the suit house in any manner or to give it over to any body on lease. The establishment of post office in the suit premises and its possession by the Union of India was illegal and unauthorized. The plaintiff, therefore, prayed for a

declaration that the action of her husband – defendant no.5 in parting with the possession of the suit premises to the Union of India was illegal and void, and that the possession by the Union of India was illegal. She also prayed for recovery of possession of the suit premises from the Union of India. The suit was contested by the defendants nos. 1 to 4 by written statement Exh.12. According to the defendants, the plaintiff was the Benami holder. The defendant no.5 was the real owner of the suit house, the defendant no.5 had lawfully put the Union of India in possession of the suit premises and that the claim made by the plaintiff was false and frivolous.

The learned Civil Judge, by judgment and decree dated 18th April, 1979 decreed the suit. The learned Civil Judge was pleased to hold that the plaintiff was the sole and real owner of the suit house and that delivery of possession of the suit premises to the Union of India by the defendant no.5 was illegal and unauthorized. The learned Civil Judge directed the Union of India to hand over vacant and peaceful possession of the suit premises to the plaintiff.

Feeling aggrieved, the Union of India preferred

Regular Civil Appeal No. 69 of 1979 in the Court of learned District Judge, Rajkot. The Appeal was heard and decided by the learned Assistant Judge, Gondal. By the *impugned* judgment and order dated 20th July, 1984, the learned Assistant Judge confirmed the finding recorded by the trial Court and dismissed the Appeal. Therefore, the present Second Appeal.

The Appeal is admitted to final hearing on the following substantial questions of law :-

I. Whether on the following established and uncontroverted facts of the case, Sec.41 of the Transfer of Property Act is attracted so as to enable the defendant to protect their possession ?

[a] The plaintiff is a pardanshin lady.

[b] The husband of the plaintiff was acting as Manager of her property.

[c] The plaintiff did not enter the witness box.

[d] The husband of the plaintiff did not enter the witness box and remained ex *parte.*

[e] That there is application at Exhibit 43 given by the husband of the plaintiff representing himself to be the manager of the property of the plaintiff showing desire to lease out the property.

II. If it is held that the possession of the appellants is protected under section 41 of the Transfer of Property Act, will the provisions of section 28 of the Bombay Rent Act be attracted and then the suit will not have to be proceeded under the special jurisdiction conferred upon the Court under section 28 of the Bombay Rent Act?

Both the Courts below have recorded concurrent finding that the plaintiff had not authorized her husband, the defendant no.5 to deal with the suit premises or to let out the suit premises to the Union of India or any other person. The Union of India failed to establish that the defendant no.5 had acted with the consent of the plaintiff. Nor did the Union of India prove that the plaintiff was the Benami holder and that the defendant no.5 was the real owner of the suit house.

In absence of the proof that the plaintiff had given her consent or authority to the defendant no.5 to act on her behalf or to deal with the suit house, the principle of ostensible owner embodied in Section 41 of the Transfer of Property Act, 1882 cannot be invoked. In my opinion, the Courts below have rightly recorded finding in favour of the plaintiff and decreed the suit.

For the aforesaid reasons, the Appeal is dismissed with cost.

Mr. Mithani has submitted that the Post Office is housed in the suit premises since the year 1973. The appellants have to hand over the possession of the suit premises to the plaintiff. The appellants shall have to make alternative arrangement for establishing or shifting the post office. For that some time is required. If that be so, the appellants may make a request to the executing court to grant time to the appellants to hand over the vacant possession of the suit premises on suitable terms and conditions.

{Ms. R.M Doshit, J.}

*Prakash**